No. 82-

82-1289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE CHICAGO HOUSING AUTHORITY,
Petitioner,

v.

DOROTHY GAUTREAUX, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

PATRICK W. O'BRIEN
(Counsel of Record)
BEVERLEY J. KLEIN
MICHELE ODORIZZI
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Attorneys for Petitioner

Of Counsel:

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

CALVIN H. HALL
General Counsel
The Chicago Housing Authority
22 West Madison Street
Chicago, Illinois 60601

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QUESTIONS PRESENTED

1. Whether the courts below erred in holding that, despite the fact that a final judgment with respect to both liability and remedy had been entered herein in 1969, the entire case was nevertheless "pending" as of October 19, 1976 and plaintiffs* could therefore be awarded fees under the Civil Rights Attorneys' Fee Award Act of 1976, 42 U. S. C. § 1988, for work performed from the filing of the complaint in August, 1966 to June, 1980.

2. Whether the courts below erred in awarding plaintiffs attorneys' fees for all proceedings, including those where plaintiffs failed to obtain the relief sought.

3. Whether the courts below erred in holding that plaintiffs' motion for fees, filed almost a year after the last substantive proceedings were had in the case, was timely.

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* When this case was originally filed in 1966, there were six named plaintiffs in addition to Dorothy Gautreaux: Odell Jones, Dorothea R. Crenshaw, Eva Rodgers, James Rodgers, Robert M. Fairfax and Jimmie Jones.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authority

IN THE

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OCTOBER TERM, 1982

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PETITION FOR CERTIORARI

Petitioner The Chicago Housing Authority ("CHA")[1] prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 30, 1982.

OPINIONS BELOW

The opinion of the district court granting plaintiffs' motion for attorneys' fees in the amount of $375,375, *Gautreaux* v. *Landrieu*, 523 F. Supp. 684 (N. D. Ill. 1981), appears in the Appendix at page 30a. The opinion of the Seventh Circuit

[1] Pursuant to Sup. Ct. Rule 28.1, CHA states that it is a municipal corporation, which has no parent companies, subsidiaries or affiliates.

affirming the judgment, *Gautreaux* v. *The Chicago Housing Authority*, 690 F. 2d 601 (7th Cir. 1982), appears in the Appendix at page 1a.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 30, 1982. A timely petition for rehearing with a suggestion for rehearing en banc was denied on November 1, 1982. App. 44a. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves the application of the Civil Rights Attorneys' Fee Award Act of 1976, 42 U. S. C. § 1988, which provides in relevant part as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs."

STATEMENT OF THE CASE

On August 9, 1966, plaintiffs filed a complaint against the Chicago Housing Authority on behalf of themselves and other black tenants in, or applicants for, public housing in Chicago, alleging that CHA had intentionally selected public housing sites and adopted tenant assignment procedures designed to maintain existing patterns of racial segregation in the city in violation of the Fourteenth Amendment of the United States Constitution and 42 U. S. C. § 1983. Plaintiffs prayed for an order requiring CHA to submit and carry out site selection and

tenant assignment plans that would eliminate the past discrimination. Plaintiffs did not ask for attorneys' fees in their complaint.

In February, 1969 the district court entered summary judgment for plaintiffs on their § 1983 claim. *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907 (N. D. Ill. 1969). On July 1, 1969 the district court entered a judgment order setting forth the relief granted. *Gautreaux* v. *Chicago Housing Authority*, 304 F. Supp. 736 (N. D. Ill. 1969). That order provided a formula for CHA site selection decisions under which 700 new public housing units were to be constructed in predominantly white neighborhoods before any could be constructed in predominantly black neighborhoods; thereafter, three new units were to be constructed in predominantly white neighborhoods for every one constructed in a predominantly black neighborhood. The order also required CHA to submit, within 60 days, a non-discriminatory tenant assignment plan. Finally, CHA was ordered to use its "best efforts" to increase the supply of dwelling units as rapidly as possible in conformance with the judgment. The court retained jurisdiction

> "... for all purposes, including enforcement and the issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed developments designed by CHA alone or in combination with other private or public agencies to achieve results consistent with this order, material changes in conditions existing at the time of this order or any other matter." 304 F. Supp. at 741.

No appeal was taken by CHA from this order, either on the issue of liability or the issue of relief.

On October 31, 1969, CHA filed the new tenant assignment plan called for in the July order. (R. 102.) That plan was ultimately approved by the district court on November 24, 1969. (R. 107.)

From 1969 to 1979, when the basic guidelines set forth in the judgment order were modified, there was a series of proceedings concerning construction of the new public housing contemplated by the 1969 decree. In 1970 plaintiffs obtained an order from the district court compelling CHA to immediately submit 263 new public housing sites which had been approved by the United States Department of Housing and Urban Development ("HUD") to the Chicago City Council, which was required by state law to approve the sites. *Gautreaux* v. *Chicago Housing Authority*, 436 F. 2d 306 (7th Cir. 1970), *cert. denied*, 402 U. S. 922 (1971). When CHA complied with this order and the Council failed to hold hearings or otherwise act on the site selection plan submitted to it, plaintiffs filed a supplemental complaint in February, 1972 seeking to bypass City Council approval. (R. 176.) Subsequently, CHA was ordered to proceed with the housing plan despite the lack of City Council approval. *Gautreaux* v. *Chicago Housing Authority*, 342 F. Supp. 827 (N. D. Ill. 1972), *aff'd*, 480 F. 2d 210 (7th Cir. 1973), *cert. denied*, 414 U. S. 1144 (1974).[2]

In September, 1974, plaintiffs filed yet another motion, this time seeking the appointment of a commissioner to formulate plans for the expeditious construction of new public housing, which had been stalled as a result of a moratorium on the construction of new federally financed public housing. The motion was denied, but the case was referred to a master for a

[2] During this period, there was also litigation in a companion case plaintiffs had filed against HUD, alleging that it had participated in the segregation of Chicago public housing. In 1971, summary judgment with respect to liability was entered against HUD. *Gautreaux* v. *Romney*, 448 F. 2d 731 (7th Cir. 1971). The district court then consolidated the cases against HUD and CHA and plaintiffs filed a motion, which was granted, asking the court to consider metropolitan area relief against HUD. *Hills* v. *Gautreaux*, 425 U. S. 284 (1976). In 1981, HUD and the plaintiffs entered into a consent decree that finally settled the remedial issue; CHA was not a party to and is not bound by that decree. See App. 11a, n. 17.

study of the causes of the delay and the formulation of a plan to construct new public housing in conformance with the 1969 decree. Sixty-eight hearings were held before the Master from 1975 through 1979, at which CHA's progress in complying with the 1969 order was examined in detail.

In 1979, while the Master was preparing her final report to the Court, plaintiffs, HUD, and CHA submitted a joint motion to the court seeking the approval of a new housing plan developed by CHA. The district court accepted the plan and on May 18, 1979 modified the 1969 order in a number of respects.[3]

In December, 1979 plaintiffs filed a motion alleging that CHA had failed to comply with the May, 1979 order and seeking appointment of a receiver to administer the development activities of CHA. After a hearing, the district court denied the motion, without prejudice, and directed CHA to "make an immediate and substantial start toward full compliance with the May, 1979 order within six months." *Gautreaux* v. *Landrieu*, 498 F. Supp. 1072, 1075 (N. D. Ill. 1980).

No other proceedings with respect to CHA were had in the case until May, 1981, when plaintiffs filed a motion seeking attorneys' fees under § 1988. This was the first time the issue of fees had ever been raised in the entire course of the litigation. Plaintiffs' motion sought compensation at the rate of $125 to $175 per hour for the services of plaintiffs' lead counsel.

[3] The district judge later described the modification as follows:

"The order contained three significant provisions: 1) it removed CHA's obligation to put its first 700 units in white or general public housing neighborhoods; 2) it changed the ratio of new construction and rehabilitation with respect to white versus black neighborhoods [from 3:1 to 1:1]; and 3) it explicitly included elderly housing. Finally, the order required CHA to concentrate on the rehabilitation method of developing public housing by providing that 300 units be rehabilitated and 100 units be newly constructed." *Gautreaux* v. *Landrieu*, 498 F. Supp. 1072, 1073 (N. D. Ill. 1980).

Alexander Polikoff, dating back to the inception of the litigation. A total of 3,003 hours were claimed, for which plaintiffs sought a fee of from $375,375 to $575,575. In an affidavit attached to their application, plaintiffs sought compensation for 1,607 hours spent from 1966 through January, 1970 obtaining the ruling on summary judgment and the 1969 remedial decree. They also sought compensation for 344 hours of work on enforcement issues that had been completed by 1974.[4]

Over CHA's objection, the district court granted the motion for fees, awarding plaintiffs the minimum amount they had requested of $375,375. On appeal, the Seventh Circuit affirmed, with one judge dissenting, holding that fees had been properly awarded in the case *"pendente lite."*

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision in this case was largely predicated on the notion that a civil rights case remains "pending" until the remedy has been fully implemented. Because the new public housing contemplated by the 1969 judgment order in *Gautreaux* had not been built by 1976 or by the date of the court's decision on fees, the Seventh Circuit held that the case was "pending" on October 19, 1976 when § 1988 became effective and remained pending when fees were awarded. This determination had several consequences. First, it meant that plaintiffs were eligible for fees under § 1988 for all the work done in the case from its filing in 1966 through the

[4] In addition, plaintiffs claimed compensation for 822 hours of work done from January 1974 to August 1979 primarily with respect to the appointment of a Master and hearings before the Master, for 30 hours of consultation concerning CHA's housing plan, which was approved in May, 1979, for 130 hours of work done from January 1980 to April 1981 primarily with respect to plaintiffs' attempt to obtain appointment of a receiver, for 20 hours spent reviewing quarterly CHA reports from 6/30/71 to 4/4/81, and for 40 hours spent in preparing the fee affidavit.

1980 hearings—even though final judgments had been entered with respect to liability and remedy seven years before § 1988 went into effect. Second, because plaintiffs prevailed on the pre-1976 proceedings, the court treated them as having prevailed "on the whole" and thus awarded them fees even for post-1976 enforcement efforts that were unsuccessful. Finally, because the court viewed the award of fees as having been made *pendente lite*, it was able to sidestep the issue of the timeliness of the motion, which was filed almost a year after the last substantive proceedings in the case had been concluded.

When Congress enacted § 1988, it intended it to apply only to cases that were "pending" as of October 19, 1976. It is clear that a case was "pending" as of that date if substantive claims remained to be decided. However, in a series of decisions beginning with *Peacock* v. *Drew Municipal Separate School Dist.*, 433 F. Supp. 1072 (D. Miss. 1977), *aff'd*, 611 F. 2d 1160 (5th Cir. 1980), the Fifth Circuit has held that where the only live issue after October 19, 1976 was the enforcement of a previously established liability, the case was not "pending" within the meaning of the Act and fees may not be awarded for work done on closed issues prior to its passage. The Seventh Circuit's adoption of a test that focuses on full implementation of the remedy directly conflicts with the Fifth Circuit approach and runs contrary to the intent of Congress. Certiorari should be granted to resolve the conflict.

The importance of this case is not, however, limited to situations where litigation began prior to the enactment of § 1988. The court's adoption of a test that focuses on full implementation of the remedy also has serious implications for other types of fee disputes. As applied in *Gautreaux*, the Seventh Circuit's test allows plaintiffs to recover for any enforcement proceedings—whether or not they prevailed in those proceedings—if they succeeded in obtaining a remedy at some time in the past. In *Hensley* v. *Eckerhart*, 664 F. 2d 294 (8th Cir. 1981), *cert. granted*, 455 U. S. 988 (1982), this Court

has already granted certiorari on this precise issue, namely, whether an award of attorneys' fees should be proportioned to reflect the extent to which the plaintiff has prevailed.

Finally, the Seventh Circuit's approach would also significantly alter the time limits applicable to petitions for fee awards. If, as the court below held, a civil rights case is not "over" for purposes of awarding fees until the remedy has been fully implemented, then in many cases there will be no time limit at all in which a motion for fees must be filed. Such a result is contrary to this Court's decision in *White* v. *New Hampshire Dept. of Employment*, 455 U. S. 445 (1982). Certiorari should also be granted on this issue.

I. The Court's Decision That The Entire *Gautreaux* Case Was Pending On October 19, 1976 Conflicts With The Fifth Circuit Test and Runs Contrary To The Congressional Intent In Enacting § 1988.

In 1976, Congress passed the Civil Rights Attorneys' Fee Award Act, 42 U. S. C. § 1988, which requires a court to award fees to a prevailing civil rights plaintiff absent special circumstances. When Congress passed this legislation, it clearly intended the new rule to apply *only* to cases that were "pending" as of the effective date of October 19, 1976. Thus, the House Report stated that:

> "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley* v. *Richmond School Board*, 416 U. S. 696 (1974)." H. Rep. No. 94-1558, 94th Cong. 2d Sess., p. 4, n.6, 1976 U. S. Code Cong. & Adm. News at 5908.

Bradley was a school desegregation case that began in 1961 and concluded its first phase in 1966 when a school desegregation plan was put into effect. In 1970 the plaintiffs filed a motion for further relief in light of various supervening Supreme Court decisions; in that motion plaintiffs also sought

attorneys' fees. Thereafter, the district court decided that a new remedial plan was required and awarded plaintiffs fees for work done on the new proceedings held from 1970 through 1971. While the case was on appeal on the fee issue, Congress enacted the Education Amendments of 1972, which specifically permitted a court to award a reasonable fee where appropriate in a school desegregation case. The Fifth Circuit refused to apply the statute, holding that only legal services rendered after the effective date of the Act were compensable under it. This Court reversed. In his opinion for a unanimous Court, Justice Blackmun held that the statute should be applied, based on the ordinary principle that

> "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U. S. at 711.

Thus, *Bradley* held that a plaintiff who was still litigating his entitlement to attorneys' fees when the Act was passed could obtain the benefit of the new statute. It necessarily follows that the statute would also be applied to cases where a plaintiff was still litigating the substance of his claim on the date the statute became effective and consequently had not yet had an opportunity to file a motion for fees.

The *Bradley* rule was applied in the context of § 1988 in *Peacock* v. *Drew Municipal Separate School District*, 433 F. Supp. 1072 (N. D. Miss. 1977), *aff'd*, 611 F. 2d 1160 (5th Cir. 1980). In that case, a judgment disposing of all substantive issues had become final in May, 1976, five months before the passage of the Act. Plaintiffs nevertheless moved for an award of fees under the Act, arguing that the case had still been "pending" in October, 1976 because it remained on the court's docket or because supplemental proceedings to effectuate the judgment had been in progress at that time. The district court rejected both of these arguments, noting that plaintiff's position would produce manifestly unjust results, especially in long,

drawn-out desegregation cases where a court had issued a final judgment years before but had retained jurisdiction to ensure compliance.

The court then held that § 1988 should be applied only in those cases in which some "active" issue was pending in October, 1976. The court defined an "active" issue to mean:

> "... a substantive claim upon which a district court has not acted, either in the first instance or on remand, or a substantive claim whose disposition by the district court, or Court of Appeals, either is on appeal or is appealable. The mere pendency on the date of enactment of an attorney fees act of supplemental proceedings to effectuate a prior final judgment is not in our opinion, sufficient to convert an action into such a 'pending action' as to warrant an award of attorney fees under such act pursuant to *Bradley*-type retroactive application of the act." *Id.* at 1075.

Although it did not allow fees for the entire litigation, the court did award fees under § 1988 for supplemental proceedings, which *had* been pending on the effective date of the Act, and on which plaintiffs had prevailed.

The Fifth Circuit followed the *Peacock* decision in *Escamilla* v. *Santos*, 591 F. 2d 1086, 1088 n.1 (5th Cir. 1979), holding that supplemental proceedings to effectuate a judgment which had become final prior to October, 1976 were insufficient to convert a closed case into an open one with pending, active issues. *Accord*, *Taylor* v. *Sterrett*, 640 F. 2d 663, 668 (5th Cir. 1981).

Courts in other Circuits have also agreed with the basic proposition that fees may not be awarded retroactively when all substantive claims had been resolved in a judgment that had become final prior to the passage of the Act. See *e.g.*, *Gonzales* v. *Fairfax-Brewster School, Inc.*, 569 F. 2d 1294 (4th Cir. 1978), *cert. denied*, 439 U. S. 927 (1978); *David* v. *Travisono*, 621 F. 2d 464 (1st Cir. 1980) (holding that the Act applied

because a substantive issue as well as the issue of attorneys' fees had not yet been finally determined in October, 1976). In *Northcross* v. *Board of Education*, 611 F. 2d 624, 635 (6th Cir. 1979), *cert. denied*, 447 U. S. 911 (1980), the Sixth Circuit noted that in an ongoing civil rights case such as a school desegregation case there may be a series of final orders that cut off the possibility of obtaining fees for any prior work.

Thus, under the test generally adopted before the decision in the case at bar, if liability had been established and the contours of the remedy had been fixed before October 19, 1976, the case was no longer "pending" for purposes of § 1988. This is true even if as of that date the court was still monitoring compliance with its decrees or enforcement proceedings were in progress. Although the plaintiff would be eligible for fees under the Act for any successful enforcement proceedings, he could not be awarded fees under § 1988 for legal work done prior to October 19, 1976 in connection with closed issues such as liability and the nature of the remedy.

In this case, the final order issued by the district court in July, 1969 was a watershed event, which finally determined CHA's liability for racial discrimination in public housing in Chicago and set forth a detailed plan to remedy that discrimination. There is no question but that after 1969 there were additional post-judgment proceedings. But those proceedings did not concentrate on liability or the appropriate contours of the remedy;[5] rather, they dealt exclusively with the implemen-

[5] In affirming the fee award, the Seventh Circuit majority also suggested that the remedy against CHA had not been completely fixed as of October 19, 1976 because after that date CHA had participated in proceedings with respect to remedy in the consolidated case against HUD. The majority suggested that it was possible that as a result of the HUD litigation, CHA might be ordered to accomplish its site selection and construction program on a metropolitan basis and that therefore the scope of the remedy remained an open issue in October, 1976.

Footnote continued on following page.

tation of the provisions of the 1969 decree requiring the construction of new public housing.

Thus, while proceedings, in the form of hearings before a Master, were "pending" in this case in October, 1976, under the Fifth Circuit test they would not serve to reopen the issue of fees with respect to all of the pre-1976 proceedings. Indeed, the hearings before the Master are a classic example of "supplemental," enforcement proceedings, the purpose of which was not to establish liability or formulate a remedy, but rather to explore alternatives for accomplishing the goals set forth in the 1969 decree. As the district court instructed the Master, her mandate was to

> "... study and review segregation in Chicago public housing, to determine and identify the precise causes of the five-year delay in implementing my judgment orders, and to recommend a plan of action that will expedite the realization of my various orders and judgments." Quoted in *Chicago Housing Authority* v. *Austin*, 511 F. 2d 82, 83 (7th Cir. 1975) (denying CHA's petition for writ of mandamus to reverse the order of reference).[6]

Footnote continued from preceding page.

There are at least three problems with the majority's reasoning. First, the argument was never raised in the district court and plaintiffs explicitly excluded time spent in the HUD litigation from their fee application. Thus, there are no findings that provide a factual basis for the majority's determination that the remedy against CHA was subject to change as a result of the suit against HUD. Second, no more comprehensive remedy was ever entered against CHA; when a consent decree was finally approved in 1981, it bound only HUD. (App. 11a, n.17.) Finally, even if there had been a possibility (never realized) that the remedy might be altered by subsequent events, that fact cannot make the 1969 order any less final or the retroactive award of fees for work done in securing that order any more appropriate.

[6] Similarly, the expert hired to assist the Master was specifically directed to state his conclusions with respect to such issues as whether CHA had taken all practicable steps to identify and acquire land suitable for new public housing in predominantly white areas, wheth-

Footnote continued on following page.

There was thus no "active controversy," as that term has been defined by the Fifth Circuit, pending in this case in October, 1976. Nor had plaintiffs sought fees or attempted to preserve the issue in any way during the long course of the litigation.[7] Had plaintiffs sought fees after they were successful in obtaining a remedy in 1969 and *lost* on the issue, they would certainly not have been able to relitigate the issue seven years later because § 1988 was enacted. Plaintiffs should not be in a better position now because they failed to raise the issue of fees earlier.[8]

Thus, under the test adopted by the Fifth Circuit, plaintiffs were not eligible for fees under § 1988 for work done prior to 1969 in securing the summary judgment and the remedy or for work done in connection with a number of enforcement issues that resulted in final judgments well before 1976—work that constituted almost two-thirds of the time for which fees were requested.

The contrary result in the Seventh Circuit stemmed from its adoption of a test completely at odds with that adopted by the

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Footnote continued from preceding page.

er CHA had taken all practicable steps to comply with HUD construction cost limitations (which had been a significant barrier in the past), whether CHA was taking all practicable steps to submit proposals to alter the 1969 order if necessary to meet changed conditions, and whether CHA was taking all practicable steps to follow the Master's direction to proceed with an acquisition program. (R. 398.)

[7] Compare this case to *David* v. *Travisono*, 621 F. 2d 464, 467, n. 2 (1st Cir. 1980), where, within ten days of an April, 1976 judgment in their favor, plaintiffs moved to defer consideration of the fee issue until the end of the entire case, thus preserving it.

[8] Such a motion would not necessarily have been futile. Prior to 1975, there was disagreement in the lower courts as to whether attorneys' fees could be awarded as a matter of course in civil rights cases. In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), this Court finally settled the issue, holding that, absent statutory authority, a district court had the power to award fees only on a finding of bad faith.

Fifth Circuit. Instead of asking whether the proceedings in progress in October 1976 were in the nature of enforcement proceedings, the Seventh Circuit concentrated on whether the remedial order had been fully *implemented* by the effective date of § 1988. Thus, the court answered CHA's argument that certain substantive issues were finally closed in 1969 by chastising CHA for "neglecting to mention that progress on the site selection and construction aspect has been almost nonexistent." App. 6a. Elsewhere, the court emphasized the "dearth of remedial action," App. 10a, and the fact that as of October, 1976, CHA compliance with the court's order to build new public housing was "minimal," App. 14a.

The Seventh Circuit's position is wholly contrary to both the Fifth Circuit test and the intent of Congress. Clearly, any proceedings connected with the implementation of a remedy must be considered supplemental enforcement proceedings as that term has been used by the Fifth Circuit. Otherwise, it is difficult to imagine what types of proceedings would fall into that category. Furthermore, there is no reason to believe the Congress intended § 1988 to be used as a vehicle for awarding fees for work done on issues that had been finally decided years before. As Judge Pell observed in his dissent,

> "By October 1976, the remedy against CHA had been fixed for more than six years. Although plaintiffs continued, of necessity, to be involved in the litigation pertaining to enforcement, it does not seem to me to be within the Congressional intent that this activity should be used to create retroactive liability for a long-past decade of legal work." App. 27a.

II. This Case Also Raises The Issue Of Whether Fee Awards Should Be Proportioned To Reflect The Extent To Which A Plaintiff Has Prevailed.

This case also raises an issue on which this Court has already granted certiorari in *Hensley* v. *Eckerhart*, 664 F. 2d

294 (8th Cir. 1981), *cert. granted*, 455 U. S. 988 (1982), namely, whether an award of attorneys' fees under § 1988 should be proportioned to reflect the extent to which a plaintiff has prevailed on the issues raised in the case.

Here, it was clear that plaintiffs had prevailed on the pre-1976 proceedings. The post-1976 proceedings, however, were a different matter. In the district court, CHA argued that plaintiffs had not prevailed in any of those enforcement proceedings. Thus, plaintiffs' two attempts to obtain the appointment of a receiver both failed. And, although plaintiffs succeeded in defending the reference to a Master and thus forced CHA into a four-year round of hearings, CHA argued that those hearings were ultimately fruitless, resulting in no order of any kind from the district court.

The district judge rejected these arguments. Viewing the litigation as one continuous proceeding, he took the position that plaintiffs had prevailed on the whole and thus were automatically entitled to fees for all the work they did on all issues:

> "Viewed as a whole, there is no question that plaintiffs have prevailed in this case. When that is the situation, a court's discretion is very narrow, because fees are to be awarded 'almost as a matter of course.'" App. 40a.

The district court then went on to state that "plaintiffs' pursuit of the proceedings before the Master, the 1979 order and the motion to appoint a receiver undoubtedly contributed in a substantial way to CHA starting to provide housing in compliance with the court's orders." App. 41a. Although it is not entirely clear, the court apparently intended this as a ruling that plaintiffs had prevailed even in the supplemental proceedings because their actions were a "material factor" in obtaining CHA's "compliance." *Morrison* v. *Ayoob*, 627 F. 2d 669 (3d Cir. 1980), *cert. denied*, 449 U. S. 1102 (1981).

On appeal, the Seventh Circuit did not deal with CHA's argument that this alternative ruling was clearly erroneous:

rather, it relied wholly on the notion that, once the litigation was viewed as a single proceeding, fees would automatically be awarded for *all* of plaintiff's work because they had prevailed in the liability and remedial stages. App. 2a, 3a n.4.

We submit that in so holding the Seventh Circuit erred. A plaintiff who has prevailed on the merits of the litigation should not be automatically compensated for any enforcement proceedings he may ultimately bring, without regard to whether those proceedings resulted in any real benefit. Nor should plaintiffs' attorneys receive compensation indefinitely for their work in monitoring compliance with the court's decrees. In this case, plaintiffs sought and received fees for 20 hours of "reviewing" CHA compliance reports for ten years between 1971 and 1981. Since the case is still deemed to be "pending," plaintiffs' lead counsel can apparently continue billing CHA on an indefinite basis at the rate of $62.50 for each half hour he spends reading the quarterly compliance reports. Such a result does not comport with the congressional intent in enacting § 1988.

III. The Seventh Circuit's Focus On Full Implementation Of The Decree Effectively Eliminates Any Time Limit On Motions For Fees.

This Court should also grant certiorari to review the Seventh Circuit's treatment of the issue of the timeliness of the motion for fees. As noted above, plaintiffs did not ask for fees in their complaint, nor did they attempt to preserve the issue of fees in any way during the long course of this litigation. Indeed, it was not until May, 1981, almost one year after the last unsuccessful enforcement proceeding launched by plaintiffs had been concluded, that plaintiffs' counsel made their first motion for fees. Nevertheless, because the remedy had not yet been fully implemented, the Seventh Circuit held that fees had been appropriately awarded "*pendente lite*."

If the Seventh Circuit's rule is applied to other cases, it will enable plaintiffs' attorneys to file for fees at any time, no matter how long ago there were any proceedings, so long as some element of the remedy has not yet been implemented. Such a position is squarely opposed to this Court's recent holding that "unreasonable tardiness" in filing a motion for attorneys' fees may provide a basis for denying the motion. *See White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 454 n. 17 (1982). In his concurring opinion in *White*, Justice Blackmun noted that the Court had come "close to approving" the position of the Eighth Circuit that a motion for assessment of attorneys' fees raises a "collateral and independent claim" which ought to be filed within a short time fixed by local rule. 102 S. Ct. at 1168. *Obin* v. *Internat'l Ass'n of Machinists & Aerospace Workers*, 651 F. 2d 574, 584 (8th Cir. 1981). If such a time limit is to have any meaning at all, a reasonable rule must be adopted to fix the point at which the time limit begins to run. This case presents an appropriate vehicle for establishing such a rule.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PATRICK W. O'BRIEN
(Counsel of Record)
BEVERLEY J. KLEIN
MICHELE ODORIZZI
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Attorneys for Petitioner

Of Counsel:

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

CALVIN H. HALL
General Counsel
The Chicago Housing Authority
22 West Madison Street
Chicago, Illinois 60601

Dated: January 31, 1983.

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2223

DOROTHY GAUTREAUX, *et al.*,

Plaintiffs-Appellees,

v.

THE CHICAGO HOUSING AUTHORITY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 66-C-1459 and 66-C-1460 (consolidated)—
Marvin E. Aspen, *Judge Presiding.*

ARGUED MAY 10, 1982—DECIDED AUGUST 30, 1982

Before CUMMINGS, *Chief Judge*, DAVIS, *Associate Judge*,* and PELL, *Circuit Judge*.

CUMMINGS, *Chief Judge*. This appeal is a byproduct of the celebrated *Gautreaux* case, whose complexities and history are summarized in *Gautreaux v. Landrieu*, 523 F. Supp. 665, 667-669 (N.D. Ill. 1981). The issue here is relatively narrow: the propriety of an interim award of attorney's fees under 42 U.S.C. § 1988 to Alexander Polikoff as the representative of counsel for the plaintiff

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* The Honorable Oscar H. Davis, Associate Judge of the United States Court of Claims, is sitting by designation.

class.[1] District Judge Crowley ordered the Chicago Housing Authority (CHA) to pay $375,375 for more than 3,000 hours of work between 1965 and 1980.[2] *Gautreaux v. Landrieu*, 523 F. Supp. 684 (N.D. Ill. 1981). On appeal CHA argues that Judge Crowley erred because

(1) the suit against CHA (*i.e.*, 66-C-1459)[3] was not "pending" on October 19, 1976, when the Civil Rights Attorney's Fees Awards Act of 1976 (codified at 42 U.S.C. § 1988) became effective, and therefore no fees are awardable under the statute although plaintiffs have prevailed in the litigation as a whole;

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[1] The fees are to be paid directly to the Illinois Division of the American Civil Liberties Union (ACLU, for whom Mr. Polikoff acted as volunteer lead counsel in *Gautreaux* until 1970) and to Business and Professional People for the Public Interest (BPI, which Mr. Polikoff has headed since 1970 and which has staffed the *Gautreaux* case with volunteer lawyers from 1970 to the present). 523 F. Supp. at 691; Polikoff affidavit, CHA App. 2. None of the other attorneys who have worked on the case, either for the ACLU or for BPI, makes any claim to fees for services rendered. 523 F. Supp. at 685; Polikoff affidavit, CHA App. 7.

[2] Although the Department of Housing and Urban Development (HUD) joined the CHA in opposing some aspects of the fee award in the district court, it is not a party to this appeal. Fees under Section 1988 are not available against HUD, *Shannon v. Dept. of Housing and Urban Dev.*, 577 F.2d 854, 856 (3d Cir. 1978), certiorari denied, 439 U.S. 1002; but the fees awarded by Judge Crowley do not require CHA to pay more than its share. The Polikoff affidavit (CHA App. 5-6) excludes time that would be allocable to HUD, as well as time spent on litigation with other parties and on unsuccessful aspects of plaintiffs' case.

[3] 66-C-1459 and 66-C-1460 (the case against HUD) were consolidated in 1971 (R. 100 of docket sheets for 66-C-1460). The consolidation was in response to our decision in *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971), that HUD was as culpable as CHA in perpetuating segregated low-income housing in Chicago. CHA suggests that the consolidation has contributed to an erroneous finding that fees were awardable here (Reply Br. 7); our discussion of that argument is found at pp. 7-10, *infra*.

(2) if any aspects of the suit could be considered pending on October 19, 1976, they were only supplemental enforcement proceedings in which the plaintiffs did not prevail as Section 1988 requires;

(3) the petition for fees was not timely filed; and

(4) the award of fees at a rate of $125 per hour for 3.003 hours was an abuse of discretion.

Finding all these arguments unpersuasive, we affirm the district court's fee award.

I

The most substantial issue CHA presents is whether the *Gautreaux* litigation was pending on October 19, 1976.[4] Congress enacted the Fees Awards Act in 1976 in response to the Supreme Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (courts are not free to award attorney's fees to parties serving as "private attorneys general" absent specific legislative authorization). The Act provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Although the statute is silent on the point, the legislative history makes clear that Congress intended Section 1988 as amended to "apply to all cases pending on the date of enactment [October 19, 1976] as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)." H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4, n. 6.[5]

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[4] In view of our resolution of this question (argument (1) *supra*), we need not address argument (2) above, that only supplemental proceedings took place after 1976 and that plaintiffs did not prevail in them.

[5] In incorporating *Bradley*, Congress must be deemed to adopt its analysis. The salient features of *Bradley* are that a court is to apply the law in effect at the time of its decision, unless it

(Footnote continued on following page)

The issue posed in this appeal is how that legislative direction is to be applied to equitable proceedings that have lasted sixteen years and are not yet concluded. Put differently, the question is whether the test that has developed for determining pendency is to be applied in a technical or a common-sense fashion.

In the formulation of the test on which the parties and the district judge focused, a case is pending if there is an "active" issue that has not been finally resolved at the critical time. An "active" issue is defined—by a process of inclusion and exclusion—as

> a substantive claim upon which a district court has not acted, either in the first instance or on remand, or a substantive claim whose disposition by the district court, or the Court of Appeals, either is on appeal or is appealable. The mere pendency on the date of enactment of an attorney fees act of *supplemental* proceedings to effectuate a prior final judgment is not, in our opinion, sufficient to convert an action into such a "pending action" as to warrant an award of attorney's fees under such an act pursuant to the *Bradley*-type retroactive application of the act.

Peacock v. Drew Municipal Separate School Dist., 433 F. Supp. 1072, 1075 (N.D. Miss. 1977) (emphasis added), affirmed on basis of district court opinion, 611 F.2d 1160 (5th Cir. 1980) (*per curiam*).

CHA takes a literal view of the test. The district court had found in 1969 that CHA engaged in intentional racial discrimination in its low-income housing program, 296 F. Supp. 907 (N.D. Ill. 1969). The court had entered a remedial order shortly thereafter, 304 F.

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[5] *continued*

would be clearly unjust to do so or there is legislative direction to the contrary; and that it is not clearly unjust to give a fee statute retrospective effect where the parties have disparate abilities to protect themselves, where a public right is vindicated, and where the law does not change the substantive obligations of the parties.

Supp. 736 (N.D. Ill. 1969). CHA had taken no appeal from either decision. Therefore, it argues, all subsequent proceedings (whether they generated appeals or not) were efforts to effectuate the 1969 judgment and hence "supplemental."[6] (Br. 17-29.) The district judge, by contrast, took a common-sense approach. He viewed the district court's broad retention of jurisdiction[7] and its frequent modifications of the 1969 injunction[8] as evidence that "continuing judicial proceedings that would involve active controversy were expressly contemplated." 523 F. Supp. at 689. Looking at the entire course of the litigation, he found no justification for treating the 1969 order, though it was admittedly final in the sense of "non-appealable," as so conclusive of the parties' dispute that the next twelve years of litigation could be called "supplemental proceedings to effectuate a prior final judgment." *Id.* at 688-689.

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[6] The summary of the consolidated litigation at 523 F. Supp. 665, 666-668, lists eight published district court decisions, six Court of Appeals opinions, and one Supreme Court case. Four additional district court decisions and two further appeals postdate the summary. CHA would treat all but two of these as either supplemental or related solely to the HUD case.

[7] Paragraph X of the order, 304 F. Supp. 736, 741, provides:

> This Court retains jurisdiction of this matter for all purposes, including enforcement and the issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed developments designed by CHA alone or in combination with other private or public agencies to achieve results consistent with this order, material change in conditions existing at the time of this order, or any other matter.

The retained jurisdiction was promptly exercised as well. The initial order was supplemented on September 12, 1969; September 15, 1969; October 20, 1969; October 23, 1969; and November 24, 1969. See 436 F.2d 306, 308 (7th Cir. 1970).

[8] We were informed at oral argument that the July 1969 injunction has been modified seventeen times to date—eight times before October of 1976 and nine times thereafter.

Like the district judge, we favor a common-sense approach. It is more consistent with the history of this particular lawsuit, with other cases in which the applicability of the Fees Awards Act has been an issue, and with the nature of equitable proceedings in general not to divide a continuously active equitable case into a host of separate smaller matters.

Gautreaux Revisited

We begin with a summary of how this litigation has gone, what CHA has been ordered to do, and what its track record for compliance is. The purpose of this summary is to demonstrate the artificiality of CHA's conceit that the case ended, for Section 1988 purposes, in 1969 and to refute an alternative CHA argument, namely, that only the companion case against the Department of Housing and Urban Development (HUD) was pending in 1976 and that "CHA's marginal participation in the case against HUD should [not] affect its liability for fees in the other case." Reply Br. 7.[9]

Judge Austin's original remedial order, 304 F. Supp. at 737-743, had two focuses: CHA was to modify its tenant assignment system, which had previously resulted in a high degree of racial segregation in existing housing. CHA was also to adopt new site selection and construction procedures to ensure that new housing was not concentrated in segregative patterns or built on a huge and dehumanizing scale. CHA points out that "the tenant assignment plan was never an issue after [1969]" (Br. 26), but it neglects to mention that progress on the site selection and construction aspect has been almost nonexistent.[10]

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[9] See note 3 *supra*.

[10] "[D]espite continuous litigation, numerous hearings and remedial court orders and referral to a Special Master • • •, during the past twelve years, plaintiffs have yet to realize more than token relief." 523 F. Supp. at 667 (referring to the consolidated litigation).

Historically, CHA's procedure for selecting housing sites was to submit proposals to the Chicago City Council. After the July 1969 order, it submitted no proposals, arguing that matters were best postponed until after the April 1971 mayoral elections. This Court affirmed Judge Austin's order directing CHA to submit proposals to the City Council by September 20, 1970. 436 F.2d 306 (7th Cir. 1970), certiorari denied, 402 U.S. 922. Thereafter it was the City Council's turn to be recalcitrant. It conducted no hearings on the CHA submissions. Accordingly Judge Austin ordered CHA to bypass the City Council, even though Council approval was a procedural step required by Illinois statute. A divided panel of this Court affirmed, 480 F.2d 210 (7th Cir. 1973), certiorari denied, 414 U.S. 1144. In both of these appeals CHA conduct was directly in issue and CHA was an appellant in this Court.

After the consolidation of the CHA and HUD cases in 1971, CHA also found itself involved in the consolidated HUD case. It is disingenuous, however, to call CHA's participation "marginal" (CHA Reply Br. 7). For example, CHA intervened on appeal to challenge Judge Austin's decision to enjoin HUD from disbursing $26 million in Model Cities funding to Chicago. We reversed, 457 F.2d 124 (7th Cir. 1972), on the ground that there was an insufficient connection between the Model Cities Program and CHA's segregation of low-income housing. CHA was also a party to the appeal of Judge Austin's decision restricting the scope of HUD and CHA remedial activities to the city limits of Chicago—a decision we also reversed, 503 F.2d 930 (7th Cir. 1974), affirmed sub nom. *Hills v. Gautreaux*, 425 U.S. 284. CHA's interest in both appeals is not hard to discern. It would be under increased pressure to comply with Judge Austin's orders if its failure to do so could jeopardize the City's receipt of other federal funds; and it wanted to be sure that if its site selection and construction program had to be metropolitan in scope, HUD's resources would be committed on the same scale. CHA did not attempt to secure Supreme Court review of our decision about a metropolitan remedy. Only HUD was a petitioner in *Hills v. Gautreaux*, 425 U.S. 284. But the Supreme

Court's decision made clear that on remand CHA would be equally implicated in the metropolitan relief that the district judge could properly order:[11]

> Both CHA and HUD have the authority to operate outside the Chicago city limits. * * * [I]t is entirely appropriate and consistent with *Milliken* to order CHA and HUD to attempt to create housing alternatives for the respondents in the Chicago suburbs.

426 U.S. at 298-299 (footnote omitted).[12]

In short, after the Supreme Court's decision in April of 1976, the entire suit came back to the district court in a new posture: both HUD and CHA could be ordered to remedy the effects of their past discriminatory practices by siting, building, and financing low-income housing throughout the Chicago metropolitan area. In the proceedings before a magistrate, which began before the Supreme Court decision and went on for five years,[13] the

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[11] CHA takes an unjustifiably narrow view of the Supreme Court's language. "The fact that the court later ordered *HUD* to engage in metropolitan area relief does not detract from the completeness of the [1969] remedy against CHA." Reply Br. 8 (emphasis in original).

[12] The Court noted, 425 U.S. at 298, n. 14:

> Illinois permits a city housing authority to exercise its powers within an "area of operation" defined to include the territorial boundary of the city and all of the area within three miles beyond the city boundary that is not located within the boundaries of another city, village, or incorporated town. In addition, the housing authority may act outside its area of operation by contract with another housing authority or with a state public body not within the area of operation of another housing authority. Ill. Rev. Stat. c. 67½, §§ 17(b), 27c (1973).

[13] CHA's penultimate appeal to this Court involved the district judge's reference of the case to Magistrate Olga Jurco. The reference antedated the Supreme Court's decision and directed the magistrate to determine if CHA was using its best efforts to comply with the 1969 order as modified and, if not, whether contempt proceedings would be appropriate. CHA asked this Court to issue a writ of mandamus, directing the district judge to retain the case himself. A divided panel declined to do so, 511 F.2d 82 (7th Cir. 1975).

additional relief was discussed and attempts were made to have CHA cooperate in implementing it.[14]

Throughout these twelve years of proceedings (1969-1981), CHA's response to orders by the court and the magistrate ranged from lethargic to obdurate. The record simply does not support CHA's version—that it was docile, even zealous, unless forces outside its control made obedience a complete impossibility (Reply Br. 9-11). Asked to evaluate CHA's compliance efforts, the magistrate recommended against finding CHA in contempt (Second Report, App. 49).[15] But she also found that "CHA site search and acquisition have neither been efficient nor vigorous and therefore not numerically productive" (Draft Final Report, App. 96); that, although some delay was "attributable to factors not within the complete control of CHA and HUD, [these factors] should have been anticipated by them and must be prepared for in the future because they continue" (*id.*, App. 98); and that "[t]he prevalent deterrent to CHA performance has been a reluctance to relinquish application of self-imposed criteria in the exercise of its judgment of what it concludes to be suitable remedial housing for plaintiff class as well as inefficient bureau-

[14] It is evident from the magistrate's second, third, and (draft) final reports that the Supreme Court's decision did have an impact on the proceedings and that means of achieving metropolitan relief were considered and adopted thereafter. See App. 53 (joint voluntary efforts by CHA and HUD warrant postponing judicial action); App. 69 (CHA to request cooperation with suburban housing authorities, with CHA channeling federal subsidies to those authorities in exchange for commitment to reserve 50% of resulting units for *Gautreaux* plaintiffs); App. 72-76 (HUD and local authorities, including CHA, enter into Gautreaux Demonstration Program in Chicago and suburbs); App. 93 (of local authorities invited to cooperate with CHA, only Elgin responds positively, but later rescinds agreement).

[15] CHA asserts that "[a]t no time in the history of this protracted litigation has CHA ever been charged with failing to comply with any order of the district court" (Br. 35). That is literally true but misleading.

cratic operation" (*id.*, App. 102). The most scathing indictment of CHA's compliance can be found in Judge Crowley's reluctant decision not to put CHA into receivership, 498 F. Supp. 1072, 1075 (N.D. Ill. 1980):

> With great reservation, the motion to appoint a receiver is denied without prejudice. * * * Best efforts will no longer suffice; compliance [with the May 1979 modified order] will be measured by results, not intentions. Bureaucratic inefficiency will no longer be tolerated by the Court. The inaction of the CHA to date is a clear indication of indifference to the orders of this Court and to the rights of the citizens of Chicago.

Based on the foregoing, it is difficult to argue that this litigation ended in any practical sense with the 1969 orders, or that the succeeding stages were "supplemental." It is also hard to believe that no substantive issues remained open and unresolved in the fall of 1976. Quite apart from the dearth of remedial action, the scope of possible remedy had changed. Finally, it is impossible to treat the CHA's involvement in any of these issues as "marginal."

Other Precedents

A comparison of the *Gautreaux* litigation with the cases on which CHA relies is also instructive. With one exception, they all involve much more discrete and conclusive lawsuits than we have found. Thus *Peacock, supra*, 443 F. Supp. 1072, dealt with a challenge by two plaintiffs to a school district policy of refusing to employ unwed mothers. Before the enactment of amended Section 1988, definite backpay and reinstatement relief had been ordered and the fee issue finally resolved. Only an effort to recover supplemental backpay was pending on October 19, 1976. The district judge found this too thin a wedge to open the entire litigation for the award of some $122,000 in fees, especially where "plaintiffs were free to effectuate their judgment for over one and one-half years prior to enactment of the 1976 Act." 433 F. Supp. at 1075.

In *Escamilla v. Santos*, 591 F.2d 1086 (5th Cir. 1979), a prisoners' Section 1983 suit had ended with a consent decree in July of 1976 and a memorandum order denying attorneys' fees in August of 1976. The district judge had amended his decision and granted fees after October 19, 1976, solely because the August memorandum order did not satisfy the technical requirements of a final judgment under Rule 58 of the Federal Rules of Civil Procedure.[16] The Fifth Circuit reversed, holding that a technical defect did not undermine finality where the judge and both parties clearly treated the order as final at the time it was entered.[17]

Finally, *Gonzales v. Fairfax-Brewster School, Inc.*, 569 F.2d 1294 (4th Cir. 1978), certiorari denied, 439 U.S. 927, involved plaintiffs' attempts to obtain fees, although the Court of Appeals had denied them, the Supreme Court had affirmed, and the Supreme Court's mandate had been returned to the district court—all before the Fees Awards Act's effective date. Plaintiffs' theory, rejected by the Fourth Circuit, was that a pending motion for costs under 28 U.S.C. § 1920 preserved the attorneys' fee issue under the statute.

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[16] Fed. R. Civ. Proc. 58 provides that "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

[17] In a footnote, 591 F.2d at 1088, n. 1, the Court added: "The plaintiffs' October 1, 1976, motion concerning the appellants' failure to comply with the consent decree is in the nature of a supplemental proceeding to effectuate the prior consent judgment and is insufficient to make a pending active issue. See *Peacock v. Drew Municipal Separate School District, supra*." This note is not authority for CHA's contention that all proceedings after the 1969 order in *Gautreaux* were supplemental. First, no consent decree has been entered against CHA. The consent decree that has been formulated, 523 F. Supp. 665, appeal pending Nos. 81-2308, 81-2311, 81-2361 (argued May 10, 1982), binds only HUD. Second, the Fifth Circuit does not describe the nature of any noncompliance or the relief sought, factors that would be relevant to an assessment of whether litigation has been concluded.

A fair comparison of these cases and the *Gautreaux* litigation readily suggests important differences. First, none appears to involve ongoing disputes about the propriety and efficacy of the relief initially granted.[18] Indeed only one could conceivably have involved relief that was long term or complicated, such that a court's retained jurisdiction would not only be provided for, but invoked.[19] Second, all three cases involve thinly-disguised attempts to generate an issue solely in order to come within the pendency rule. In *Gautreaux* the plaintiffs' unremitting pressure on CHA over twelve years—and their decision to ask for attorneys' fees only as the litigation draws to a close—bespeak no such opportunism. The Sixth Circuit's remark in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 635 (1979), certiorari denied, 447 U.S. 911, could equally apply here: "[P]laintiffs' delay in applying for fees * * * was largely due to the fact that there was no earlier time to pause for litigation of the fee issue * * *."

CHA instances one case that is factually more similar to *Gautreaux* in which fees were nonetheless denied. There is however an important distinction, and it undercuts CHA's position. In *Henry v. Clarksdale Municipal Separate School District*, 579 F.2d 916 (5th Cir. 1978) (*per curiam*) (*Clarksdale* V), the Fifth Circuit construed Section 718 of the Emergency School Aid Act, 20 U.S.C. § 1617, a fee provision applicable to school desegregation cases pending on July 1, 1972.[20] A

[18] *Peacock* involved supplemental back pay; *Gonzales* involved only attorneys' fees. *Escamilla* apparently involved fees as well, but see note 17 *supra*.

[19] In *Escamilla*, the lawsuit challenged living conditions in the Webb County, Texas, Jail. The conditions, and what corrective measures were ordered, are not specified in the opinion. In contrast, *Peacock* involved two named plaintiffs' suit for reinstatement to employment; and *Gonzales* was the epilogue to *Runyon v. McCrary*, 427 U.S. 160, a suit by two black children denied admission to private Virginia schools because of race.

[20] This provision and its retrospective effect are the subject of the Supreme Court's opinion in *Bradley, supra*, 416 U.S. 696.

majority of the panel held that plaintiffs' motion to require bus transportation by the School District, made after July 1, 1972, was not sufficient to render the litigation pending after that date. Apart from the motion, no active issues remained: "all definitive or substantive orders of the district court for desegregating the Clarksdale public schools as to students, faculty, staff, and services *had been entered and were being complied with*." 579 F.2d at 918 (emphasis added). The majority therefore affirmed the district judge's decision to award no fees for work done between 1964, when the suit was first filed, and 1972.[21]

Judge Tjoflat in dissent in *Clarksdale* V disagreed with the majority's treatment of the busing motion, finding it an integral step in the achievement of a unitary school system, rather than a supplemental enforcement effort. *Id.* at 921. He also thought the majority's characterization of the school district's compliance was naive:

> [A] school system is not automatically desegregated when a constitutionally acceptable plan is adopted and implemented. "If the journey from *Brown* to *Swann* has taught us anything, it is that integration does not occur merely when and because we say it should."

Id., quoting *Thompson v. Madison County Board of Education*, 496 F.2d 682, 686 (5th Cir. 1974). Finally Judge Tjoflat believed that the majority was avoiding the plain import of the *Bradley* decision.[22] 579 F.2d at 920.

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[21] The Court had affirmed the award of fees for work done after July 1, 1972, 480 F.2d 583, 585-586 (5th Cir. 1973) (*Clarksdale* IV). It apparently assumed before the decision in *Bradley* that the fee statute could not provide compensation for work done before its effective date. See 579 F.2d at 920 (Tjoflat, J., dissenting).

[22] *I.e.*, he disapproved of the Court's adhering to the result it had reached earlier (note 21 *supra*), when the rationale for that result had been undercut completely by *Bradley*.

While we find ourselves in sympathy with Judge Tjoflat's position, we need not adopt it to determine that CHA's arguments are not advanced by *Clarksdale* V. CHA would have to show, as the School District did in the *Clarksdale* V majority's opinion, that "all definitive and substantive orders * * * had been entered and were being complied with" before October 19, 1976. As our summary of the *Gautreaux* litigation amply indicates, relief was still being formulated in 1976 and CHA compliance was minimal.

Finding CHA's precedents readily distinguishable, the district judge placed reliance instead on *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E.D. Pa. 1980). There a lawsuit challenging the defendants' racially discriminatory hiring and promotion practices had been filed in 1973 and a consent decree entered in 1974. Nonetheless, the court treated the suit as still pending in 1976, for purposes of Section 1988, because "the consent decree expressly contemplated a continuing judicial proceeding." 491 F. Supp. at 961. The defendants were under court order to develop job-related hiring and promotion criteria, demonstrate the criteria's validity to the district judge, and then use them to remedy past discrimination. But

> [n]early six years after the entry of the 1974 consent judgment and four years after passage of the 1976 Fees Awards Act, implementation of the class relief remains in the initial stage. Nor have plaintiffs been responsible for the delay in any way. Defendants have simply not fulfilled their obligation to develop and present to the Court evidence of valid, nondiscriminatory employment standards. *Id.*

In the absence of controlling precedent in this Circuit,[23] Judge Crowley was correct to recognize the dis-

[23] The chief basis for decision in *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977), certiorari denied, 438 U.S. 916, was that the legislative history of the Fees Awards Act referred to the specific suit as an example of one in which awards for earlier work would be appropriate. *Id.* at 174. Fees had earlier been

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tinguishability of the Fourth and Fifth Circuit cases and to rely instead on *Bolden*.[24]

The Nature of Equitable Proceedings

The district judge's decision is also consistent (and CHA's arguments are not) with the nature of modern suits in equity. When broad equitable relief is sought to remedy a constitutional violation, the remedy must be tailored to the scope of the violation. *Hills v. Gautreaux*, *supra*, 425 U.S. at 293-294; cf. *Milliken v. Bradley* (*Milliken* I), 418 U.S. 717, 744; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16. With that caveat, however, the federal district judge acting as chancellor "has broad and flexible powers to mold each decree to the necessities of the particular case and to remedy the consequences of past constitutional violations." *Gautreaux v. Romney*, *supra*, 457 F.2d at 133 (Sprecher, J., dissenting). The reality in such cases, as we have learned primarily in the school desegregation context, is that the finding of a constitutional violation is in a practical sense only the preliminary hurdle. The heart of the lawsuit is the remedial stage, where the parties struggle, often for years, over the scope and details of injunctive relief. Under such circumstances it is not uncommon for the parties to take no appeal from the initial liability determination—as the parties in *Gau-*

[23] *continued*

awarded because of the defendants' bad faith, 528 F.2d 688 (7th Cir. 1976), vacated and remanded in light of the Fees Awards Act, 429 U.S. 973—a justification that was unaffected by the *Alyeska* decision, 421 U.S. 240, 258-259.

In *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979), there was no dispute about the pendency of the case on October 19, 1976, because it was not resolved until 1977. We did, however, reject the defendants' argument that it would be inequitable to award fees for work going back to 1971, when the case was first filed.

[24] *David v. Travisono*, 621 F.2d 464 (1st Cir. 1980) (*per curiam*), and *Northcross*, *supra*, 611 F.2d 624, are also consistent with the result reached by Judge Crowley. See 523 F. Supp. at 687, n. 2.

treaux did not—because they recognize the wisdom of husbanding their energy and resources for the true battleground. Cf., *e.g.*, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 428 (Board voted to take no appeal from district court's finding of liability and entry of initial injunction); *Bradley v. Milliken*, 468 F.2d 902 (6th Cir. 1972), certiorari denied, 409 U.S. 844 (after trial on the merits, 338 F. Supp. 582 (E.D. Mich. 1971), initial appeal involved unsuccessful challenge to district judge's interlocutory order that desegregation plans be submitted; liability finding not challenged); *Bradley v. School Board of Richmond*, 345 F.2d 310, 313 (4th Cir. 1965), vacated on other grounds, 382 U.S. 103 (Board never challenged liability determination, but only whether it should have a reasonable opportunity to correct deficiencies without an injunction issuing).

The notion of pendency for Section 1988 purposes ought to bear some relation to this reality. Judge Crowley recognized as much when he resisted CHA's persistent efforts to "mischaracterize this case as a series of separate matters instead of recognizing it as a continuous litigation." 523 F. Supp. at 689.

We are mindful of the genuine concern, discernible in some of the cases on which CHA relies and in the dissenting opinion of Judge Pell, that an expansive view of pendency in equitable proceedings may permit long dormant cases to be reopened solely for the purpose of obtaining attorneys' fees that were not available when the cases were in active litigation. See, *e.g.*, *Scott v. Winston-Salem/Forsyth County Board of Education*, 400 F. Supp. 65, 68 (M.D.N.C. 1974), affirmed without opinion, 520 F.2d 969 (4th Cir. 1975) (discussing 20 U.S.C. § 1617). But marginal cases can be left for another day: in *Gautreaux* there has been no hiatus or period of dormancy, and the issues pending in 1976 and after have been central to the merits, not supposititious.

Furthermore, an award of fees under the 1976 Act is addressed to the discretion of the district judge, and he may refuse them—or limit them—if special circumstances would make a full award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402. The question then becomes what circumstances are "special"

in a retrospective award of fees? Surely not the duration and expense of the litigation, once it is found to have been pending on the relevant date—otherwise the Congressional purpose would be subverted by judicial fiat. As the First Circuit has observed, "once the door to the Fees Act is opened, a full inquiry as to plaintiffs' entitlement to an award [is] in order. It is of no moment that the services in question were rendered almost entirely prior to the effective date of the Act." *David v. Travisono*, 621 F.2d 464, 468 (1st Cir. 1980) (*per curiam*). Surely also not a party's expectation at the outset of the litigation that fees would not be awardable, "since there is no indication that the [statutory] obligation * * *, if known, * * * would have caused [the party] to order its conduct so as to render [the] litigation unnecessary and thereby preclude the incurring of such costs." *Bradley, supra*, 416 U.S. at 721. The *Northcross* Court, *supra*, 611 F.2d at 635, has suggested several factors that would qualify: the entry of final orders disposing of interim aspects of prolonged cases, including attorney fee claims; the presence of potentially liable defendants who have joined the litigation principally as *amici curiae*; or the existence of delay that causes demonstrated prejudice to the defendants.

CHA has not argued that special circumstances, in the sense described above, make the award of fees against it unjust.[25] As we have recently had occasion to remark, "the burden of demonstrating the existence of special circumstances is on the defendant * * * and the 'special circumstances' limitation of section 1988 is applicable only to unusual cases." *Crosby v. Bowling*, ... F.2d ....., ..., slip op. No. 81-2109 (7th Cir., July 20, 1982) at 8. Instead CHA has concentrated its fire on the argument that the case was not pending at all on October 19, 1976—or that if certain portions of the case were pending then, the *Gautreaux* plaintiffs were not prevailing parties—thus making the award of fees legally improper. We find Judge Crowley's contrary decision that the entire litigation in which plaintiffs did prevail

[25] CHA does make a laches argument in a somewhat different context. See Part II *infra*.

was open to a fee award more consistent with Congressional purpose, the *Gautreaux* case itself, the relevant precedents, and the powers of a court of equity.

II

CHA's second line of defense is that the *Gautreaux* plaintiffs' fee application was untimely. The argument proceeds as follows: attorneys' fees under Section 1988 are "costs" governed by Rule 54(d) of the Federal Rules of Civil Procedure,[26] *Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 659-660 (7th Cir. 1981). Rule 54(d) has no intrinsic time limit, but Rule 45 of the General Rules of the Northern District of Illinois requires that a motion for "costs" be filed within ten days of entry of a judgment allowing costs. Failure to file in time waives "costs other than those of the Clerk, taxable pursuant to 28 U.S.C. § 1920." Therefore, according to CHA, at least since 1973 when Local Rule 45 took effect, the *Gautreaux* plaintiffs should have filed motions for attorneys' fees within ten days of each order entered in the case.

There are two defects in this argument. First, neither Judge Crowley in this case, 523 F. Supp. at 689, nor Judge Marshall in *Independent Voters of Illinois v. Chicago Housing Authority*, No. 76 C 3683 (N.D. Ill. Jan. 31, 1979) (unpublished but reproduced in CHA App. at 114-124), has subscribed to CHA's construction of Local Rule 45. They treat Rule 45 as applying only to Judicial Code Section 1920 costs (a category that does not include attorney's fees), and a late Rule 45 motion as waiving four of the five kinds of costs otherwise recoverable under Section 1920. In short, Rule 45 has nothing whatsoever to

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[26] Rule 54(d) provides:

> *Costs.* Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

do with a motion for attorney's fees under Section 1988. Cf. the discussion in *Metcalf v. Borba*, 51 L.W. 2081 (9th Cir. July 22, 1982).

Another problem with CHA's timeliness argument, which Judge Crowley recognized, 523 F. Supp. at 689, is that these fees are being sought *pendente lite*, *Hanrahan v. Hampton*, 446 U.S. 754, and not at the conclusion of the litigation. That is, the event that triggers the time limit of Rule 45, even if the rule were applicable, has not yet occurred: no judgment allowing costs has been entered. To be sure, the original injunction and its modifications have provided that costs will be assessed against CHA when they are determined,[27] but that time has not yet arrived. In other words, in its timeliness argument—as in its pendency argument—CHA has overestimated the discreteness of the various stages of this litigation.

Absent a fixed time limitation, the only constraint on when the plaintiffs file for attorneys' fees under Rule 54(d) of the Federal Rules is laches (CHA Br. 32). A laches claim must demonstrate both undue delay and prejudice to the non-delaying party, *Advanced Hydraulics, Inc. v. Otis Elevator Co.*, 525 F.2d 477, 479 (7th Cir. 1975), certiorari denied, 423 U.S. 869. Here

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[27] Paragraph XI of the 1969 injunction provides that "[t]he costs of this action shall be taxed against CHA, *subject to further orders of this court*." 304 F. Supp. at 741 (emphasis added). An illustration of how the costs provision works can be found in the May 19, 1978, order (App. 109), dealing with the compensation of an urban housing expert.

> (4) The compensation to be paid to the expert shall be fixed by further order of this Court. The expert may, however, apply from time to time to the Master for compensation and reimbursement of expenses and shall keep records of time spent.
>
> (5) Pursuant to Article XI of this Court's order of July 1, 1969, the compensation and expenses of the expert, as approved by the Master and ordered by the Court, shall be borne by defendant CHA and taxed as costs in this action.

CHA can show neither. A motion for fees *pendente lite* is presented early rather than late: "the party to whom the fees [are] awarded [has] established the liability of the opposing party, although final remedial orders [have] not been entered." *Hanrahan, supra*, 446 U.S. at 747. The logic behind such an interim award must be that, although it is premature in a sense, the plaintiff is sufficiently likely to prevail ultimately that he (or his lawyers) should be relieved from financial hardship until then. Prematurity and laches are antinomical concepts.

CHA also does not succeed in demonstrating prejudice from the timing of the fee application. It instances only Mr. Polikoff's claim for forty hours spent on reconstructing his hours from 1965 to 1980 (Br. 32, n.*). Less than three hours per year strikes us as fast work by Mr. Polikoff: he could not reasonably have been expected to spend less time constructing an earlier petition for fewer hours. It is much more likely, as appellees point out, that CHA has benefited from the timing: "in th[e] reconstruction, Mr. Polikoff omitted many hours he could no longer recall or document." (Br. 16; cf. Polikoff affidavit, CHA App. at 5.)

III

Having found that the Fees Awards Act applies to this litigation and that the fee petitions were filed at an appropriate time, it remains only to consider CHA's arguments about the actual amount of the award. This last step of our review asks only whether the district judge's fee award under Section 1988 amounted to an abuse of discretion.

CHA's main contentions are that (1) an hourly rate of $125, though it concededly "is not excessive in the current market for legal services," is too high for all the work done over a fourteen-year period; (2) the fees should be limited because they are to be paid to ACLU and BPI, two not-for-profit organizations; and (3) the fees should be reduced because of the financial diffi-

culties CHA is experiencing (Br. 35-36; quoted language at 35). These arguments were all fully aired before the district judge, and we cannot fault his resolution of them.

It is appropriate in this case to award a current hourly rate (rather than various historical rates) for all the hours claimed. In the first place, the appellants' attorneys have had no fees at all during an intensely inflationary period. The use of current market rates in comparable circumstances has been approved in *Copeland v. Marshall*, 641 F.2d 880, 893 & n. 23 (D.C. Cir. 1980) (*en banc*); *Northcross, supra*, 611 F.2d at 635; *Hernandez v. Finley*, slip op. No. 74 C 3473 (N.D. Ill. Feb. 20, 1981) at 4; *Custom v. Quern*, 482 F. Supp. 1000, 1006 (N.D. Ill. 1980) (*semble*). In the second place, the compensation awarded multiplies the minimum number of hours Mr. Polikoff worked by the hourly rate,[28] and Mr. Polikoff stands as a surrogate for the teams of volunteer lawyers who have staffed the *Gautreaux* case since its inception.[29]

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[28] The total hours claimed are 3,003, all related directly to the litigation against CHA (see note 2 *supra*). The district judge noted that "from this court's personal observations the figure, at least since 1976 [when Judge Crowley first became involved in the case], is conservative in the extreme." 523 F. Supp. at 684.

The dissent says that the claimed hours "could only charitably be called an educated guess" (p. 28 *infra*). Neither at trial nor on appeal did CHA challenge the accuracy of the affidavit or the records to support it. CHA Br. 4, 32. The dissent's preference for "*contemporaneous*, complete and standardized time records" (p. 29 *infra*) is difficult to square with *any* retroactive application of the Fees Awards Act. Under that interpretation, counsel would have to be prescient as well as successful.

[29] See note 1 *supra*. In addition to volunteer attorneys not of record, law clerks, and other support personnel, the attorneys of record include Charles Markels, Bernard Weisberg, Milton I. Shadur, Merrill A. Freed, Roger Pascal, Robert J. Nollen, Douglas W. Cassel, Jr., Elizabeth Lasser, and Howard A. Learner.

Thus CHA is not being penalized: it has had the use of its money until now, which should offset the application of current hourly rates; and it is not being required to pay for all the legal help plaintiffs have had. CHA also objects to the uniform $125 rate because the plaintiffs had no entitlement to fees until 1976 and delayed petitioning for them until 1981. These grounds simply restate the timeliness argument (Part II *supra*) and take issue once again with Congress' stated intent in enacting the Fees Awards Act (Part I *supra*).

The notion that fee awards should be reduced where they are to be paid to not-for-profit organizations has been rejected by every court of appeals to consider it. See *Copeland v. Marshall*, *supra*, 641 F.2d at 896-900, especially the catalog of precedents under various fee statutes at 900.[30] Three judges in the Northern District of Illinois have similarly rejected the argument: *Dietrich v. Miller*, 494 F. Supp. 42, 44 (N.D. Ill. 1980) (Bua, J.); *Custom v. Quern*, *supra*, 482 F. Supp. at 1002-1005 (N.D. Ill. 1980) (Marshall, J.); and *Lackey v. Bowling*, 476 F. Supp. 1111, 1116-1117 (N.D. Ill. 1979) (Grady, J.). We take this opportunity to make explicit what was implied in *Hairston v. R & R Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975) (construing 42 U.S.C. § 3612(c)): the Seventh Circuit should be added to *Copeland*'s roster.

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[30] Cf. *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 447 (7th Cir. 1981), certiorari denied, 50 U.S.L.W. 3376 (district court's award of fees under Title VII correct, despite defendants' argument that they would be paid over to Seventh-Day Adventist Church and thus violate Establishment Clause); *Northcross*, *supra*, 611 F.2d at 637 (district court denial of fees to NAACP Legal Defense Fund improper; trial court's basis for denial apparently that NAACP lawyers provided duplicative services).

Recently the Third Circuit has invalidated on public policy grounds a contractual agreement between Community Legal Services (CLS) and the Pennsylvania state agency that funds CLS. The contract disabled CLS, a not-for-profit legal services organization, from requesting or accepting fees under Section 1988. *Shadis v. Beal*, 51 L.W. 2082 (3d Cir. July 20, 1982).

The financial difficulties of CHA are alluded to only in passing in the brief on appeal (Br. 36). CHA apparently does not argue that its plight warrants a flat denial of fees—a position that is foreclosed by *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), certiorari denied, 450 U.S. 919. Rather it argues that the district judge, who awarded plaintiffs the least amount requested[31] "in recognition of CHA's limitations," 523 F. Supp. at 691, should have cut the figure back still further. CHA has submitted no information that might even tempt us to second-guess the district judge on this issue, and of course second-guessing a discretionary decision is not the role of a reviewing court. *Harrington v. DeVito*, 656 F.2d 264, 269 (7th Cir. 1981), certiorari denied, 50 U.S.L.W. 3696 ("Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court."). Judge Crowley considered CHA's financial hardship argument and adjusted his award accordingly.[32] That satisfies us.

CONCLUSION

The district court correctly determined that *Gautreaux v. CHA* was a pending case on October 19, 1976 and that plaintiffs were prevailing parties though the litigation

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[31] The fee petition asked for $125-$175 per hour in light of the "skill, education and experience [of counsel] and the complexity of the case." 523 F. Supp. at 685. That would produce a basic figure of $375,375-$525,525. It suggested that any further adjustments in the basic figure should be upward rather than downward.

[32] In the district court CHA also argued that, as a consequence of its straitened financial condition, the fee award would have come out of funds that would otherwise provide low-income housing for the plaintiffs. That is potentially true in any case in which the body required to pay has the ability to shift its costs. What is equally true is that without legal help the *Gautreaux* plaintiffs would probably never have obtained any relief at all. 523 F. Supp. at 691.

was not yet over. Accordingly, it was possible under Section 1988 to award fees *pendente lite* to plaintiffs' lawyers. No special circumstances existed to make the award of fees for the entire course of the litigation unjust, and there was no abuse of discretion in the determination of the amount of the award. CHA's liability for $375,375 in attorneys' fees is affirmed; costs to appellees.

PELL, *Circuit Judge*, dissenting.

In this case the parties do not disagree with the majority opinion that in enacting 42 U.S.C. § 1988 Congress intended that a district court have the *discretion* to award attorneys' fees to a *prevailing party* in civil rights cases *pending* before district courts on the 1976 effective date of the section, including fees for work performed before that date. On the facts of this case, which I do not view in quite the same way as does the majority opinion,[1] it appears to me that the district court's allowance of fees of $375,375 to the plaintiffs for work of which approximately two-thirds had occurred during a period spanning a full decade prior to 1976, rendered under the sponsorship of two not-for-profit organizations, neither of which, nor their attorneys, during that decade, expected to be compensated by the opposing party, goes beyond the reasonable boundaries indicated by the Congressional intent. I therefore respectfully dissent.

[1] In viewing the facts, we are concerned with whether the case against CHA was pending in October 1976 within the meaning of the Congressional intent. To do so we must look at the record of the proceedings. I regard the issue as not being a question of whether the district court abused its discretion, or whether its findings—and the record should speak for itself in that respect—were clearly erroneous, but whether as a matter of law that record reflects such pendency as will breathe life—and fees—into litigation which was no longer pending in the sense of the relief which precipitated it still being sought.

It is true that the case in the district court, which was filed in 1966, was still carried on the docket of the court in 1976 and at the time the fee award was made in 1981. Indeed, this situation remains true to this date. It is not an unusual experience in injunctive cases for a court to retain continuing jurisdiction to see that a dispositive decree is in fact implemented. The majority properly noted that other cases have been concerned that a too expansive view of pendency in equitable proceedings may not provide the basis of a claim for attorneys' fees, this being true even though the issues which brought about the litigation have long since been settled with the court retaining only supervisory jurisdiction for implementation purposes.

In the present case the plaintiffs in 1969 had a judgment entered in their favor permanently enjoining the CHA from invidious discrimination on the basis of race in the conduct of the public housing system. The CHA was ordered to use its best efforts to increase the supply of dwelling units as rapidly as possible in conformance with the judgment. The court retained jurisdiction:

> for all purposes, including enforcement and issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed developments designed by CHA alone or in combination with other private or public agencies to achieve results consistent with this order, material changes in conditions existing at the time of this order or any other matter.

304 F. Supp. at 741.

The majority opinion recognizes the propriety of the test laid down in *Peacock v. Drew Municipal Separate School District*, 433 F. Supp. 1072 (N.D. Miss. 1977), *aff'd*, 611 F.2d 1160 (5th Cir. 1980) (per curiam) for determining the requisite pendency. The parties do not seem to disagree that the case would be pending if there was an "active" issue that had not been finally resolved at the critical time. An "active" issue was defined in *Peacock* as being:

> We interpret "active" issue to mean a substantive claim upon which a district court has not acted, either in the first instance or on remand, or a substantive claim whose disposition by the district court, or Court of Appeals, either is on appeal or is appealable. The mere pendency on the date of enactment of an attorney fees act of supplemental proceedings to effectuate a prior final judgment is not, in our opinion, sufficient to convert an action into such a "pending action" as to warrant an award of attorney fees under such act pursuant to *Bradley*-type retroactive application of the act.

Id. at 1075.

As in *Peacock*, it appears to me from an examination of the record that proceedings subsequent to the judgment in 1969 were "nothing more than providing for enforcement of defendants' previously established liability." *Id.* It is true that implementation did not occur with any rapidity. Factors, however, beyond the control of the CHA entered into the picture including a recalcitrant city council and a moratorium on new federally financed public housing. At this point it is appropriate to refer to a factor which the majority opinion seems to blur into insignificance, and that is that there were two separate suits originally filed by the plaintiff Gautreaux—one against CHA, which is all we are concerned with here, and the other against the Department of Housing and Urban Development (HUD). The two cases were, in 1971, consolidated. At that time the district court was not contemplating any changes in the relief ordered in 1969 against CHA and was attempting to formulate a remedy in the case against HUD. This effort continued for many years. While the remedy against HUD was not formulated until long after October 1976, the fact that CHA willy-nilly was a party in the same action with HUD should not affect its liability for fees simply because the HUD case was still viable in 1976.

In the district court, the plaintiffs themselves recognized the two cases should not be treated as one for purposes of awarding attorneys' fees by specifically exclud-

ing from the hours for which compensation was claimed the time spent on proceedings in the companion case against HUD.

Leaving aside the case against HUD, it appears to me from the record that all of the proceedings against CHA within the relevant period from October 1976 to the present were in the nature of supplemental enforcement proceedings to effectuate a prior judgment final as to liability. The main part of those proceedings consisted of appearances before a Master at which the only goal was the "exploration of possible alternative courses in a difficult area" with a view to a final report for "possible use by the district court." There is no indication that a more comprehensive remedy with respect to CHA was being formulated or, indeed, was ever formulated. In simple language, the 1969 order was intended to be, and in fact was, a comprehensive remedy designed to terminate the past effects of discrimination in the CHA system and prevent discrimination in the future.

By October 1976, the remedy against CHA had been fixed for more than six years. Although plaintiffs continued, of necessity, to be involved in the litigation pertaining to enforcement, it does not seem to me to be within the Congressional intent that this activity should be used to create retroactive liability for a long-past decade of legal work. Even more simply, there were no substantive claims pending in October 1976 insofar as CHA was concerned. It is of interest to note that the majority opinion chooses to distinguish cases from other circuits which have addressed generally the present matter and place principal reliance, as the district judge, on a district court case, *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E.D. Pa. 1980).

The majority opinion brushes aside in a marginal note the secondary contention of CHA that if any aspects of this suit could be considered pending in October 1976, they were only, at best, supplemental proceedings in which the plaintiff did not prevail as required by Section 1988. Although CHA was forced into a four-year round of hearings before the Master, those hearings

ultimately resulted in no order of any kind from the district court. An eventual modification of the 1969 order, not in a substantive but in a remedial enforcement sense, resulted not from the plaintiffs' efforts but followed CHA's resolution of its difficulties with HUD that made it possible for CHA to develop the plan that was accepted by the district courts and the plaintiffs to implement the 1969 decree.

I feel certain that the dockets of the district courts around this country reflect many cases which remain under the necessary continuing supervision of a district judge even though the substantive issues which brought about the litigation have been disposed of long prior to October 1976. I decline to believe that the Congress intended to stand the 1976 amendment on attorneys' fees on its head by opening these cases to attorneys' fees going back to the institution of suit with the fees to be awarded on a monetary basis reflecting an unrealistically inflated amount inapplicable to the time at which the bulk of the services was rendered.

Finally, I am concerned by what is evident in this case of policy reasons for not expanding Section 1988 into the dim past to encompass work which not-for-profit organizations[2] have performed with no expectation of securing attorneys' fees as a result of which no accurate recordation of hours spent has been maintained. Thus, in this case it appears that the lead counsel had to rely upon what could only charitably be called an educated guess. I think the proper standard is set forth in *National*

[2] I am not unmindful of case law holding that even though public interest organizations were willing to undertake cases such as the present prior to 1976 without expectation of securing attorneys fees, they, nevertheless, may now be entitled to such fees, even though such fees have windfall aspects; nor am I unmindful that cases have held that these fees may be substantially keyed to rates current at the time of the award although the services substantially antedated that period, but viewing the payment order in this case I cannot regard it as other than incorrect under the law.

Association of Concerned Veterans v. Secretary of Defense, ... F.2d ..... (D.C. Cir. 1982) where the court states "attorneys who anticipate making a fee application must maintain *contemporaneous*, complete and standardized time records which accurately reflect the work done by each attorney." (Emphasis supplied.) Slip Op. at 11.

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 5730—Midwest Law Printing Co., Inc., Chicago—8-30-82—400

Dorothy GAUTREAUX, et al., Plaintiffs.

v.

Moon LANDRIEU, Secretary of Department of Housing and Urban Development, et al., Defendants.

Nos. 66 C 1459, 66 C 1460.

United States District Court,
N. D. Illinois, E. D.

June 30, 1981.

MEMORANDUM OPINION AND ORDER

CROWLEY, District Judge:

This matter comes before the court on plaintiffs' motion for an award of attorneys' fees against the Chicago Housing Authority (CHA). For the reasons stated below, the motion is granted in the amount of $375,375.

This case has had a protracted history. The complaint was filed on August 9, 1966, seeking a declaration that CHA was operating a racially discriminatory public housing system, an injunction against continued discrimination, and other relief the court deemed just and equitable. That resolution of these allegations was hard fought is evident from a citation to reported decisions: 265 F.Supp. 582 (N.D.Ill.1967); 296 F.Supp. 907 (N.D.Ill.1969); 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922, 91 S.Ct. 1378, 28 L.Ed.2d 661 (1971); 342 F.Supp. 827 (N.D.Ill.1972), *aff'd*, 480 F.2d 210 (7th Cir. 1973); *cert. denied*, 414 U.S. 1144, 94 S.Ct. 895, 39 L.Ed.2d 98 (1974); 384 F.Supp. 37 (N.D.Ill.1974); 511 F.2d 82 (7th Cir. 1975); 498 F.Supp. 1072 (N.D.Ill.1980).

Contending that they have prevailed in their action, plaintiffs have moved for an award of attorneys' fees under the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988 (the Act).

The Act did not become effective until October 19, 1976. Yet plaintiffs maintain that § 1988 applies to this case from its inception because the case was pending when the Act became effective. Even so, plaintiffs are not seeking an award for the services provided by all the attorneys. The motion covers only the hours of Alexander Polikoff who has been lead counsel throughout.

Mr. Polikoff's affidavit states that he has spent at least 3,003 hours in this case. He considers that figure conservative and a considerable understatement of the actual number of hours spent. From this court's personal observations the figure, at least since 1976, is conservative in the extreme. Further, Mr. Polikoff has excluded time spent on matters in which plaintiffs did not prevail and time spent against parties other than CHA in this consolidated case. In an affidavit, an experienced attorney familiar with market and billing rates in Chicago states that a reasonable hourly rate for Mr. Polikoff is in the range of $125 to $175 per hour, in light of his skill, education and experience, and the complexity of this case. Thus, the lodestar fee here is between $375,375 and $525,525. Of course, the lodestar may be adjusted up or down, but plaintiffs submit that consideration of the relevant factors for such an adjustment would suggest an upward modification.

Both the CHA and the Department of Housing and Urban Development (HUD) have opposed the requested fee award. CHA argues that the pendency of supplemental proceedings when the Act became effective cannot be a vehicle for obtaining fees for the entire litigation. Additionally, CHA maintains that plaintiffs' motion should be denied as untimely filed. Further, CHA submits that plaintiffs cannot recover fees because they were not prevailing parties within the meaning of the Act. Finally, CHA contests the reasonableness of the proposed hourly rate. HUD only partially opposes plaintiffs' motion. The federal defendant argues, like CHA, that fees may only be awarded for work after October 19, 1976 because a final order

had been entered long before that date. Also in agreement with CHA, HUD contends the hourly rate requested is excessive. With these objections, though, HUD does support the award of some fee.

The fundamental issue here is the applicability of the Act. There is no question that fees may be awarded in cases pending when the Act became effective. *Hutto v. Finney*, 437 U.S. 678, 694 n.23, 98 S.Ct. 2565, 2575 n.23, 57 L.Ed.2d 522 (1978); *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977), *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978). The issue here is the definition of "pending" and whether this case comes within it.

Both CHA and HUD argue that a summary judgment order issued on July 1, 1969 and a number of other orders in the fall of 1969 finally decided all active issues in this case. At that time, CHA's liability was determined. All other issues before the court, the defendants submit, have been supplemental, concerning the appropriate remedy to enforce the judgment. Relying primarily on *Peacock v. Drew Mun. Separate Sch. Dist.*, 433 F.Supp. 1072 (N.D.Miss. 1977), *aff'd sub nom. Andrews v. Drew Mun. Separate Sch. Dist.*, 611 F.2d 1160 (5th Cir. 1980), and *Escamilla v. Santos*, 591 F.2d 1086 (5th Cir. 1979), CHA and HUD argue the existence of remedial procedures to enforce a judgment is insufficient to make a case "pending" on the date of enactment of the Act.

In *Peacock*, the plaintiffs had filed an action in February 1973 challenging defendant's policy prohibiting employment of unwed parents by the school district. In July 1973, a final judgment was entered declaring the policy unconstitutional. The judgment enjoined enforcement of the policy, granted back pay and other affirmative relief, and retained jurisdiction in the court to effectuate the judgment. Plaintiffs had requested attorneys' fees and in October 1973 the district court denied the request. The case was appealed and in February 1975, the court of appeals affirmed the final judgment, including denial of

attorneys' fees. By May 1976, the Supreme Court had granted and then dismissed a petition for certiorari. Returning to the district court, the plaintiffs moved in August 1976 to depose the superintendent of the school district to determine back pay amounts. The deposition was permitted and plaintiffs then filed, in September 1976, a Request for Supplemental Relief seeking specific amounts of back pay. This request was pending when the Act became effective and plaintiffs renewed a request for attorneys' fees in November 1976. In December 1976, a consent order was entered resolving the back pay issue.

The *Peacock* court denied an attorneys' fees award. It was first noted that the Act should be given retroactive effect[1] in accordance with *Bradley v. Richmond School Bd.*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). The court viewed *Bradley* as presenting a situation different from the one before it, however. In *Bradley*, a fee award was pending resolution on appeal when the statute providing availability of fees was enacted. In *Peacock*, on the other hand, the fee issue and all other "substantive" issues had been finally resolved before the effective date of the Act. The *Peacock* court interpreted *Bradley* and the legislative history to require application of the Act only in cases in which an "active issue" was pending on the enactment date.

An active issue was defined as "a substantive claim upon which a district court had not acted, either in the first instance or on remand, or a substantive claim whose disposition by the

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[1] With due respect to the court, this issue is not a matter of retroactivity. Rather, it involves the traditional rule that a court should apply the law that is in existence at the time it renders a decision, unless the statute or congressional intent dictates otherwise or unless the application would result in manifest injustice. *Northcross v. Board of Educ.*, 611 F.2d 624, 633 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980); *see Wright v. Califano*, 603 F.2d 666, 672 n.17 (7th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

district court or Court of Appeals, either is on appeal or is appealable." 433 F.Supp. at 1075. Thus, the court reasoned that the pendency of supplemental proceedings to effectuate a final judgment is not within the definition of an "active issue". Because it considered the Request for Supplemental Relief and the eventual consent decree as "nothing more than provid[ing] for enforcement of defendant's previously established liability", the court held the case was not pending on the effective date of the Act and denied attorneys' fees.[2]

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[2] The *Peacock* decision was affirmed per curiam, 611 F.2d 1160 (5th Cir. 1980), and its reasoning was followed in another Fifth Circuit case cited by CHA. In *Escamilla v. Santos*, 591 F.2d 1086 (5th Cir. 1979), the court concluded that a motion concerning the failure to comply with a consent decree is "in the nature of" a supplemental proceeding to effectuate a consent judgment and is not a pending active issue. 591 F.2d at 1088 & n.1. CHA has also briefly referred to other cases to support its position.

In *Gonzales v. Fairfax-Brewster Sch., Inc.*, 569 F.2d 1294 (4th Cir.), *cert. denied*, 439 U.S. 927, 99 S.Ct. 311, 58 L.Ed.2d 320 (1978), a denial of attorneys' fees had been affirmed (along with the grant of injunctive and damages relief) by the Supreme Court in August 1976. After the effective date of the Act, the plaintiffs moved for fees and costs in the district court. The Fourth Circuit affirmed denial because there had been a final judgment before October 1976 and no issue was pending. In *Henry v. Clarksdale Mun. Separate Sch. Dist.*, 579 F.2d 916 (5th Cir. 1978), an attorneys fee statute similar to the Act was at issue. The court noted that on date of enactment: all definitive or substantive orders of the district and appellate courts had been entered and were being complied with; no appeals were pending; no motion for attorneys' fees was pending; and the only order after enactment was entered upon plaintiffs' motion to require certain bus transportation. The court concluded these circumstances presented no active issue and, therefore, the case was not pending.

David v. Travisono, 621 F.2d 464 (1st Cir. 1980) is cited by contrast. There, a judgment order in April 1976 finally resolved all but one substantive issue. A request for appoint-

(Footnote continued on following page)

Plaintiffs respond that *Peacock* and defendant's other cases are distinguishable because all issues including entitlement to attorneys' fees had been resolved in final orders. Plaintiffs submit that if any aspect of a case is in active litigation on the effective date of the act and if no earlier order resolved all issues in the case, including fees, the entire case is "pending" for purposes of application of the Act. Their position is supported, plaintiffs argue, by three decisions of the Fifth Circuit after *Peacock*. *Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. 1981); *Robinson v. Kimbrough*, 620 F.2d 468 (5th Cir. 1980); *Corpus v. Estelle*, 605 F.2d 175 (5th Cir.), *cert. denied sub nom. Estelle v. Corpus*, 445 U.S. 919, 100 S.Ct. 1284, 63 L.Ed.2d 605 (1980).

In *Taylor*, the Fifth Circuit synthesized many of its decisions on this issue, including *Peacock* and *Corpus*. *Taylor* reaffirmed the rationale of *Peacock* that when all issues have been finally disposed of, including the attorneys' fees issue, before the effective date of the Act, supplemental proceedings to effectuate a final judgment are independent and do not make the entire case pending. The *Taylor* court noted that *Corpus* appeared to be to the contrary because "attorneys' fees were awarded for work done in the supplemental proceedings even though the initial case had been concluded in 1971." 640 F.2d at 669. However, this conflict was only apparent, according to

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(Footnote continued from preceding page)

ment of an ombudsman was conditionally denied without prejudice at that time. The request was finally denied in that case in June 1977. Because that issue (even though characterized as slight and trivial) and a request for attorneys' fees were unresolved in October 1976, the case was pending for purposes of applicability of the Act. Finally, *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980), is cited because the court noted there may be a series of final orders that cut off the possibility of obtaining fees for earlier work in a drawn out school desegregation case. 611 F.2d at 635.

Taylor, because the attorney's fees had not been requested until conclusion of the enforcement proceedings. *Id.* The *Taylor* court then concluded that the critical determination is "whether the attorneys' fees issue has been decided for the initial case: if this question has not been decided, then apparently this unresolved issue is sufficient to make the entire case pending." *Id.* Relying on this interpretation of *Corpus* and the fees issue, plaintiffs contend this case was pending because the issue of fees has not been decided for the "initial" case which determined the liability of CHA.

Plaintiffs also argue that the 1969 order, which CHA relies on as the final order rendering all subsequent proceedings supplemental, did not finally dispose of all issues. Instead plaintiffs contend the order contemplated a continuing judicial proceeding as did the order in *Bolden v. Pennsylvania State Police*, 491 F.Supp. 958 (E.D.Pa. 1980). In *Bolden*, a class action had been reduced to final judgment by a consent decree in June 1974 and defendants argued it was therefore not pending for purposes of applying the Act. The *Bolden* court rejected the argument because the decree expressly contemplated a continuing judicial proceeding (including an evidentiary hearing), the defendants were still operating under interim goals, and the judicial proceedings had not yet occurred. Thus, the court did not consider the case pending only in the technical sense that the court had continuing jurisdiction to enter necessary and desirable orders, but recognized it as pending for purposes of applying the Act. 491 F.Supp. 960-61. As in *Bolden*, plaintiffs contend that the 1969 order in this case expressly contemplated continuing judicial proceedings so the case was pending in October 1976.

Both aspects of plaintiffs' argument appear to be persuasively controlling.[3] However, the simple test enunciated by the Fifth Circuit in *Taylor* cannot be accepted for two reasons. First, if the crucial determination of "pending" is whether the fees issue has ever been resolved, then apparently nothing need actually be pending on the effective date of the Act. A party could move for an award of fees for the first time after passage of the Act when the case was otherwise dormant. Furthermore, if a case was in ongoing supplemental proceedings in October 1976, there is no basis for denying fees under the Act to a party who was unsuccessful under prior law, while at the same time granting fees to a party who never attempted to obtain fees under the prior law.

A second reason for rejecting the *Taylor* test is that the court inaccurately described the proceedings in *Corpus* when it attempted to harmonize the cases. When the *Corpus* court described the history of that case, it did refer to the second round of litigation as enforcing the first decision of the court of appeals. *Corpus v. Estelle*, 605 F.2d 175, 176 (5th Cir. 1979). The *Taylor* court considered those matters, which were pending in October 1976, as supplemental. However, an examination of the history of the *Corpus* litigation reveals that there was no final decision in the first court of appeals decision and the substantive claims were pending in October 1976. In *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971), the court reversed the district court's finding that the Texas Department of Corrections had an adequate alternative to justify its prohibition of legal assistance by one inmate to another. That reversal was not based on a determination that no adequate alternative

[3] The only case that could be directly binding here, *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977), *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978), is easily distinguishable on its facts. There, the attorneys' fees issue was on appeal when the Act was passed. In this case, this motion put the fee award at issue, obviously long after the effective date of the Act.

existed, but rather on a conclusion that the defendants had not carried their burden in proving one. The defendants then partially changed their policy, but the plaintiffs returned to the district court seeking an injunction against a prohibition of prisoners providing legal assistance to one another. The district court issued a declaratory judgment and an injunction in 1975. The defendants appealed and while the case was pending there, the Act became effective. The district court was affirmed in 1977. *Corpus v. Estelle*, 551 F.2d 68 (5th Cir. 1977). Thus, contrary to the *Taylor* court description, there had been no final resolution of the plaintiffs' substantive claims until the 1977 decision; the merits of the case were pending on appeal in October 1976.

Although the *Taylor* test is rejected as determinative, plaintiffs' other argument is persuasive. The defendants' premise, that the 1969 order was final and all other matters were supplemental, simply cannot be accepted. The final judgment order[4] directed CHA to file a modification of its tenant assignment plan which would be applicable until further order of the court. Thereafter, a more comprehensive plan was to be filed, following which the court had authority to enter further orders. *Gautreaux v. CHA*, 304 F.Supp. 736, 739, 740 (N.D.Ill.1969). Additionally, the order established that the results of the 1970 census would presumptively determine racial compositions of census tracts, but that the presumption was rebuttable by any party on motion. 304 F.Supp. at 737. The order also directed CHA not to build certain kinds of public housing unless with approval by court order. 304 F.Supp. at 739. Further, CHA was required to file various periodic reports with the court. Finally, in the order, the court retained jurisdiction for all

[4] The July 1969 decision granted summary judgment for plaintiffs and established CHA's liability. The opinion was not a final judgment order, though, because the court contemplated entering that 30 days thereafter. *Gautreaux v. CHA*, 296 F.Supp. 907, 914 (N.D.Ill.1969). The judgment order is reported at 304 F.Supp. 736 (N.D.Ill.1969).

purposes and listed several of them. Thus, even though this order was final in the sense that it was appealable and that it established liability, continuing judicial proceedings that would involve active controversy were expressly contemplated. On the authority of *Bolden* alone, this case was pending for purposes of applying the Act.[5] But the case also falls within the *Peacock* definition of "active issue" because the continuing proceeding necessarily involves "substantive claims upon which the court has not acted." Therefore, the Act applies to the entire litigation.

CHA also argues that plaintiffs have waived their right to fees by failing to move timely for an award. CHA contends that because § 1988 fees are assessed as costs, Rule 45 of the General Rules of this court applies. Applying that 10-day requirement, CHA submits that plaintiffs should have moved within 10 days of passage of the Act for all earlier work. Additionally, CHA asserts the 10-day requirement was not complied with on all subsequent matters. In response, plaintiffs argue that CHA mischaracterizes this case as a series of separate matters instead of recognizing it as continuous litigation. Thus, they submit Rule 45 does not apply to this motion which seeks an award *pendente lite*, before the case is fully and finally concluded.

Fee awards *pendente lite* are authorized under the Act when a party has prevailed on the merits of some of his claims. *Hanrahan v. Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980). In any event, this court has held that Rule 45 does not apply to a motion for fees under the Act. *Independent Voters of Illinois v. CHA*, No. 76 C 3683 (N.D.Ill. January 31, 1979) (Marshall, J.) Judge Marshall ruled that

[5] The facts of this case weigh even heavier than in *Bolden* toward a determination of pendency. In *Bolden*, the contemplated proceedings had not yet occurred in 1980. Here, the parties are well aware that resort to the court has often been necessary. In fact, when the Act became effective the case was actively before Magistrate Jurco.

only the doctrine of laches applies when the issue of timeliness is raised. CHA has not argued any prejudice because of the timing of this motion. Clearly, then, plaintiffs have not waived their right to an award of fees.

CHA next argues that plaintiffs are not entitled to fees for what it calls supplemental proceedings because plaintiffs did not prevail in those matters. Specifically, CHA notes that plaintiffs were unsuccessful in their attempt to have a receiver appointed by the court. In addition, CHA contends that although plaintiffs succeeded in defending Judge Austin's order appointing a Master, the hearings before the Master were fruitless because no order from the court resulted. Further, the Master had rejected plaintiffs' suggestion that a receiver be appointed. Finally, CHA submits that the only matter in which plaintiffs could arguably be considered as prevailing is the 1979 agreed order modifying the 1969 judgment to accept the CHA's housing plan. However, CHA argues that plaintiffs' action was not a material factor in bringing about CHA's decision to propose the housing plan and, therefore, they are not entitled to fees on the matter.

CHA's contentions must be rejected, however, because they are based on the continued mischaracterization of this case as many separate matters, including independent supplemental proceedings. Viewed as a whole, there is no question that plaintiffs have prevailed in this case. When that is the situation, a court's discretion is very narrow, because fees are to be awarded "almost as a matter of course." *Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979). Furthermore, the court must "allow compensation for hours expended on unsuccessful research on litigation, unless the positions asserted are frivolous or in bad faith." *Sherkow v. State of Wisconsin*, 630 F.2d 498, 504 (7th Cir. 1980), quoting *Northcross v. Board of Educ.*, 611 F.2d 624, 635-36 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980). There is no suggestion from CHA that plaintiffs' actions were frivolous or brought in bad faith; they clearly were not.

Indeed, even under the material factor test CHA relies on, the plaintiffs' claim for fees would survive. In *Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102, 101 S.Ct. 898, 66 L.Ed.2d 828 (1981), the court recognized that several factors in addition to a specific civil rights lawsuit may bring about compliance with the law by defendants. Thus, the court reasoned that the plaintiffs' action must be a material factor. Here, plaintiffs' pursuit of the proceedings before the Master, the 1979 order and the motion to appoint a receiver undoubtedly contributed in a substantial way to CHA starting to provide housing in compliance with the court's orders. Moreover, those pursuits were unquestionably a material factor in bringing about changes in defendants' conduct, especially since the motion for appointment of a receiver was denied without prejudice to renew. That motion was a substantial factor in compelling the CHA to show demonstrable progress. Therefore, plaintiffs must be considered the prevailing party in the case as a whole.

In CHA's final contention, it briefly argues that plaintiffs' hourly rate is excessive. First, CHA submits that current market rates should not be used because plaintiffs had no right to fees until 1976 and then they waited five years to request them. Second, CHA submits that the hourly rate is excessive for the proceedings since 1974 because a disproportionate amount of time was spent for the results achieved. HUD also argues that the hourly rate should be reduced, but for a different reason. HUD maintains that because Mr. Polikoff is a salaried attorney for a not-for-profit, public interest organization and the fees are to be paid directly to the Illinois Division of the American Civil Liberties Union (ACLU) and the Business and Professional People for the Public Interest (BPI), the fee award should reflect only reimbursement to BPI and ACLU for the expenses they incurred, including salary, overhead and other costs. HUD relies on two cases for this argument: *Page v. Preisser*, 468 F.Supp. 399 (S.D.Iowa 1979); *Alsager v. District Court of Polk City, Iowa*, 447 F.Supp. 572 (S.D.Iowa 1977).

The resolution of these issues need not be lengthy. Other than HUD's two cases, apparently every other court has rejected the contention that when a salaried attorney of a not-for-profit organization provides the legal services, private attorney rates should not be used. *See, e. g., Copeland v. Marshall,* 641 F.2d 880, 896-900 (D.C.Cir.1980); *Oldham v. Ehrlich,* 617 F.2d 163, 168-69 (8th Cir. 1980); *Palmigiano v. Garrahy,* 616 F.2d 598, 602 & n.6 (1st Cir.), *cert. denied,* 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980); *Dietrich v. Miller,* 494 F.Supp. 42, 44 (N.D.Ill.1980) (Bua, J.); *Custom v. Quern,* 482 F.Supp. 1000 (N.D.Ill.1980) (Marshall, J.); *Lackey v. Bowling,* 476 F.Supp. 1111, 1116-17 (N.D.Ill.1979) (Grady, J.). This court is convinced the majority of courts are correct.

CHA's objection to using current hourly market rates is also an issue that has often been rejected. *Hernandez v. Finley,* No. 74 C 3473, slip op. at 4 (N.D.Ill. Feb. 20, 1981); *Custom v. Quern,* 482 F.Supp. 1000 (N.D.Ill.1980); *see Copeland v. Marshall,* 641 F.2d 880, 893 & n.23 (D.C.Cir.1980). These decisions are based on a valid consideration: throughout the litigation use of the money has been deprived. In an inflationary era, that is a significant loss which should be compensated in part by use of current rates. Thus, the prejudice, if any, resulting from an award of fees now "has inured to the plaintiffs' attorneys who have provided years of service without compensation in hand." *Northcross v. Board of Educ.,* 611 F.2d 624, 635 (6th Cir. 1979), *cert. denied,* 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980). Current market rates, therefore, shall be used.

Only the final calculation of the award remains. An area of discretion is reserved for the court in determining the reasonable dollar amount. Plaintiffs have only submitted a range of reasonable fees and the factors enunciated in *Muscare v. Quinn,* 614 F.2d 577 (7th Cir. 1980), may require an adjustment to the lodestar figure. As plaintiffs suggest, the *Muscare* factors do militate towards an upward adjustment. HUD, on the other hand, submits the court cannot ignore the financial reality of the CHA.

The financial limitations of a party cannot justify denial of a reasonable fee. *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980); *Witherspoon v. Sielaff*, 507 F.Supp. 667, 670 (N.D.Ill.1981). Yet because plaintiffs have submitted even their lowest figure as a reasonable rate, awarding that amount in recognition of CHA's limitations does not deny plaintiffs a reasonable fee. Unquestionably, $375,375 is a substantial amount of money that might otherwise be used to provide the relief on plaintiffs' substantive claims. However, because the plaintiffs are prevailing parties the court has virtually no discretion to deny an award. Additionally, the simple fact is, without the services of Mr. Polikoff and the other attorneys (for whom no fees were sought) the plaintiffs may never have obtained the housing that only now is beginning to materialize, fifteen years after the complaint was filed.

Accordingly, plaintiffs' motion for an award of attorneys' fees is granted in the amount of $375,375. Payment shall be made directly to the Illinois Division of the American Civil Liberties Union and Business and Professional People for the Public Interest.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

November 1, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. OSCAR H. DAVIS, Circuit Judge*

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellees,

No. 81-2223 *vs.*

THE CHICAGO HOUSING AUTHORITY,
Defendant-Appellant.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant The Chicago Housing Authority, a vote of the active members of the Court was requested, and a majority** of the active members of the Court has voted to deny a rehearing *en banc*. A majority of the judges on the original panel has voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Oscar H. Davis, Circuit Judge of the United States Court of Appeals for the Federal Circuit, is sitting by designation.

** Judge Pell voted to grant the petition for rehearing.